TAKENAKA CORPORATION

v.

ASM DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
SITI MARIAH AHMAD J
[COMMERCIAL SUIT NO: D6-22-3229-1998]
4 JUNE 2008

CONTRACT: *Formation - Concluded contract - Letter of intent - Whether legally valid and binding contract created by letter of intent - Negotiations for award of contract - Letter of intent issued pursuant to negotiations - Plaintiff commenced preliminary and pre-contract works from date of letter of intent - Contract ultimately not awarded to plaintiff - Claim for payment for preliminary and pre-contract works performed - Legally valid and binding contract created by letter of intent*

CONTRACT: *Estoppel - Denial of contract, whether stopped - Conduct of parties showing the existence of a second contract - Conduct showing intention that letter of intent be extended upon expiry - Extension amounted to a separate contract - Defendant estopped from denying existence of second contract*

CONTRACT: *Construction - Remuneration - Quantum meruit - Contract arising from conduct of both parties - No provision for remuneration for works done by plaintiff - Plaintiff entitled to be paid a reasonable sum based on quantum meruit*

The plaintiff and the defendant had commenced negotiations on the award of the contract in relation to a project. Following the negotiations, the defendant had issued to the plaintiff a letter of intent dated 1 October 1996 which was valid for a period of two months from the date thereof. It was a term of the letter of intent that the plaintiff was to commence preliminary and pre-contract works from the date of the letter of intent. In the event negotiations were terminated for whatever reason, no award of contract would take place. If this happens the plaintiff would be reimbursed for works performed up to 1 December 1996 based on a certification of the works evaluated by Messrs Hijjas Kasturi Associates Sdn Bhd as the project architect subject to a maximum limit of RM800,000. The plaintiff performed the pre-contract works up to the expiry date of the letter of intent and had continued to do so even after the expiry of the letter of intent due to the repeated representations made by the defendant that the project would be eventually awarded to the plaintiff. An extended letter of intent dated 30 November 1996 was subsequently issued by the defendant. The plaintiff's acceptance of this extension letter contained an exception with

regard to the amount to be reimbursed in respect of works performed by the plaintiff up to 1 May 1997. The plaintiff later claimed an amount of RM2,800,000 being the amount payable for all preliminary and pre-contract works performed during the seven months period from 1 October 1996 until 1 May 1997. Unfortunately Messrs Hijjas Kasturi did not carry out evaluation because the defendant had failed to pay the professional fees. The defendant also was not agreeable to the appointment of independent architect to prepare evaluation report. The defendant failed to make the necessary payment and hence this suit. The defendant alleged, *inter alia*, that (i) the letter of intent was not intended to have any legal effect; (ii) the defendant's liability if any was limited to the sum of RM800,000 only; (iii) there was no evaluation by Hijjas Kasturi Associates Sdn Bhd in respect of the claim for RM800,000 and consequently the defendant was not liable to pay the plaintiff.

Held (allowing the plaintiff's claim):

(1) There was a legally valid and binding contract created by the letter of intent dated 1 October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff and the defendant had breached its obligation under the first contract by failing to secure the certificate of evaluation from Hijjas Kasturi, the project architect. (para 38)

(2) The second contract ie, the extension letter of intent came into force on 1 December 1996 upon expiry of the first letter of intent. The conduct of both parties showed that the parties had intended to have a subsequent contract in respect of the extension of the first letter of intent. The defendant had also not in any manner objected to the plaintiff's condition that the works performed during the second contract be assessed on a pro rate basis. Had the defendant made known to the plaintiff that reimbursement would be limited to RM800,000 at the time before the second contract came into force, the plaintiff would have discontinued the preliminary works. Thus, the defendant was *estopped* from denying the existence of the second contract. (paras 41 & 43)

(3) Since the second contract had arisen from the conduct of both parties, and no remuneration for works done by the plaintiff was fixed, the plaintiff was entitled to be paid a reasonable sum on a pro rate basis to which the defendant never raised any objection. In the circumstances, the defendant's liability was not only limited to RM800,000 but should be based on *quantum meruit*. (paras 46 & 48)

[Plaintiff's claim allowed for the sum of RM2,800,00.]

Case(s) referred to:
Croudace v. London Borough of Lambeth [1986] 33 BLR 20 ***(refd)***

Other source(s) referred to:
Anthony May, *Keating on Building Contracts*, 5th edn, p 78

For the plaintiff - O'Koshy; M/s Mohammad Ismail & Co
For the defendant - Joseph Yeo; M/s Joseph Yeo

Reported by Amutha Suppayah

JUDGMENT

Siti Mariah Ahmad J:

The Background Facts

[1] The plaintiff and the defendant had commenced negotiations on the award of the contract in relation to a project known as "The Proposed Mixed Commercial Development and Integrated Transport Interchange of LRT-KTM-ERL at Bandar Tasik Selatan" in particular for the construction and completion of a podium block known as Zones A and B. Following the negotiations, the defendant had issued to the plaintiff a letter of intent dated 1 October 1996 which was valid for a period of two months from the date thereof. It was a term of the letter of intent that the plaintiff was to commence preliminary and pre-contract works from the date of the letter of intent. In the event negotiations were terminated for whatever reason, no award of contract would take place. If this happens the plaintiff would be reimbursed for works performed up to 1 December 1996 based on a certification of the works evaluated by Messrs Hijjas Kasturi Associates Sdn Bhd as the project architect subject to a maximum limit of RM800,000.

[2] The plaintiff performed the pre-contract works up to the expiry date of the letter of intent and had continued to do so even after the expiry of the letter of intent due to the repeated representations made by the defendant that the project would be eventually awarded to the plaintiff.

[3] An extended letter of intent dated 30 November 1996 was subsequently issued by the defendant on 3 February 1997. The plaintiff's acceptance of this extension letter contained an exception with regard to the amount to be reimbursed in respect of works performed by the plaintiff up to 1 May 1997.

[4] The extension letter expired on 1 May 1997. The plaintiff in its letter dated 25 June 1997 set out its claim for the amount of RM2,800,000 being the amount payable for all preliminary and pre-contract works performed during the seven months period from 1 October 1996 until 1 May 1997 under the letter of intent and the extension letter of intent.

[5] Upon receiving the plaintiff's claims the defendant then requested that the plaintiff submit the breakdown of its claim of RM2,800,000 and the plaintiff complied. The plaintiff had also received a copy of the defendant's letter dated 10 July 1997 to its project architect, Messrs Hijjas Kasturi Associates Sdn Bhd instructing the architect to evaluate the plaintiffs claim for RM2,800,000. This letter was forwarded to the architect together with all documents necessary to facilitate the evaluation exercise.

[6] Unfortunately Messrs Hijjas Kasturi did not carry out evaluation because the defendant had failed to pay the professional fees. The defendant also did not agree to the appointment of an independent architect to prepare evaluation report. The defendant has failed to procure the certificate of evaluation at all.

[7] The plaintiff subsequently sent letter of demand. The defendant nonetheless failed to make the necessary payment. Therefore the plaintiff prays for:

- A sum of RM2,800,000
- Interest at the rate of 8% per annum from the date the amount became due until the date of full payment
- Costs

The Defendant's Defence

[8] The defendant alleged that the letter of intent was not intended to have any legal effect. Any work carried out by the plaintiff was carried out for its own benefit and in anticipation of the contract being awarded to the defendant. The contract was not awarded to the defendant.

[9] Alternatively, the defendant alleged that the defendant's liability if any was subject to the evaluation by Hijjas Kasturi Associates Sdn Bhd, the architect for the proposed project and limited to the sum of RM800,000 only.

[10] The defendant also alleged that there was no extension of the validity of the letter of intent as the plaintiff did not agree to the defendant limiting its liability to pay the plaintiff of up to RM800,000

only. The defendant did not at any time agree to pay the sum of RM2,800,000. Lastly the defendant alleged that there was no evaluation by Hijjas Kasturi Associates Sdn Bhd in respect of the claim for RM800,000 and consequently the defendant is not liable to pay the plaintiff.

[11] Issues for Determination

1. Whether there was a legally valid and binding contract created by the letter of intent dated 1 October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff;
2. Whether there was a fresh second contract which came into force on 1 December 1996 between the plaintiff and the defendant by way of their conduct; and
3. Whether the defendant's liability, if any, is only limited to RM800,000.

Evidence Of Witnesses

[12] A total of three witnesses were called to give evidence. The plaintiff in their case called upon one witness whereas the defendant in return called two witnesses.

The Evidence Of Gary Elmer Taylor (PW1)

[13] PW1 was and still is the director of Tengson CES Associates Sdn Bhd, a company engaged by the plaintiff to carry out commercial and contract services for the project and was seconded full time. PW1 was involved in the defendant's project as part of the tender team for the plaintiff acting as a contract manager for the preparation of the tender for the project. PW1 continues to monitor all the outstanding issues since then.

[14] PW1 was the department head in charge of all the contract, costing, budget, pricing and commercial matters. The evidence of PW1 is as follows:

[15] Immediately upon confirmation of the letter of intent, the plaintiff proceeded with all the necessary pre-contract works. Nevertheless, there was still no indication or confirmation whether or not the award to the plaintiff can be made before 1 December 1996.

[16] Subsequently the defendant issued the extension to the letter of intent on 3 February 1997 extending the original expiry date of 1 December 1996 to 1 May 1997. However the plaintiff did not agree to the condition imposed by the defendant on the maximum cost of

A RM800,000 for reimbursement if the project was abandoned during the extended period. This qualification was then inserted in the extension letter of intent.

[17] Until 10 March 1997, the defendant had still never queried or rejected the qualification that the plaintiff had inserted in the B acknowledged extension to the letter of intent. The plaintiff continued working in good faith upon expectation that the project was proceeding. On 12 March 1997, PW1 attended a meeting and was requested by the defendant to withdraw the conditions attached to the extended letter of intent.

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[18] The plaintiff by their letter informed the defendant that they could not withdraw the conditions as it was already more than three months after the original expiry date of the letter of intent where the plaintiff had repeatedly made proper representation to the defendant on this issue D but the defendant never objected to it until the meeting on 12 March 1997.

[19] On 17 March 1997 PW1 attended another meeting where the defendant confirmed its intention not to extend any further the validity of the letter of intent which expired on 1 May 1997.

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[20] The plaintiff then requested a settlement of the compensation as a result of non-award of the project on a pro-rate basis at RM400,000 per month from 1 October 1996 to the end of April 1997 for a total of RM2,800,000.

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[21] Subsequently, by a letter dated 10 July 1997 the defendant requested the Architect Hijjas Kasturi Associates to evaluate the plaintiff's claim of RM2,800,000. On 17 December 1997, the defendant again wrote to the plaintiff confirming that the defendant is still evaluating the plaintiff's claim.

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[22] On 23 November 1998 plaintiff's solicitors wrote to Hijjas Kasturi inquiring about the evaluation but Hijjas Kasturi replied stating that the defendant was not able to maintain them as professional consultants and as such it will be difficult for them to further serve the defendant.

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[23] Subsequently the defendant had no objections in Hijjas Kasturi preparing the evaluation report provided that the plaintiff should bear the costs. Since the costs charged by Hijjas Kasturi was a considerable amount and thus plaintiff opted to appoint another firm to carry out the evaluation. Hijjas Kasturi had no objections to this. Nevertheless, on I 8 February 2001 the defendant's solicitors wrote to the plaintiff's solicitors stating that the defendant was not agreeable on such proposal.

[24] During cross-examination PW1 maintained his position as set out in the examination in-chief. His evidence has not been challenged. During re-examination he maintained that the defendant or any of the staff did not instruct the plaintiff to cease work during the relevant period. He also testified that the defendant never complained about the work carried out by the plaintiff. He also stated that the defendant never officially notify that the project will not be proceeded. In his evidence PW1 also stated though the total costs incurred on the project is worth RM6,452,250 as demonstrated in the exh. P26 but the plaintiff only claimed based on pro rate basis of RM400,000 per month for five months from 1 December 1996 to 1 May 1997.

The Evidence Of Mohd Fuad Bin Yon (DW1)

[25] DW1 was the defendant's company director from 1993 to 1996. His evidence is as follows:

[26] The letter of intent was signed by DW1. The plaintiff was brought in to design and build a steel transfer structure for air-rights for a building to be constructed over three railway line ie, LRT/KTM/ ERL. The letter of intent was issued because the defendant wanted certain preliminary works to be carried out first before the project was awarded. The preliminary works were carried out for two months. If no contract was awarded after that two months, defendant would reimburse plaintiff for the works done for the two months subject to the evaluation of Hijjas Kasturi Associates and subject to a maximum sum of RM800,000. If the contract was awarded to plaintiff, the sum of RM800,000 would be absorbed and treated as part of the contract sum.

[27] In his cross-examination DW1 agreed that the evaluation of plaintiff's work is to be done by Messrs. Hijjas Kasturi, the architect of the project. He also agreed that for Hijjas Kasturi to evaluate the work, that ASM would have instructed Hijjas Kasturi to do so.

[28] He also stated ASM did instruct Hijjas Kasturi to do the evaluation but he was not aware whether its fees being paid. He also confirmed that the plaintiff proposed for independent party to prepare a report but not agreeable by the defendant. He also confirmed that there was a court order for the defendant to direct Hijjas Kasturi to prepare for evaluation report.

[29] In re-examination the defendant agreed to a maximum claim of RM800,000 with a condition that evaluation is to be done by Hijjas Kasturi.

A **The Evidence Of Mohd Fauzi Bin Yon (DW2)**

[30] DW2 was a director at the defendant from November 1996 after taking over from DW1. DW2 was the one who signed the extension letter of intent. According to him when the contract was not awarded by 1 December 1996, plaintiff requested for an extension of the letter of intent. Consequently the letter dated 30 November 1996 was issued. The reimbursement remained at RM800,000. DW2 does not remember whether the extended letter was backdated. According to DW2, a letter is usually sent after he has signed it. Plaintiff did not agree that the reimbursement be limited to RM800,000. Plaintiff accepted and signed the letter but stated that the reimbursement would be discussed and agreed if and when the project is abandoned.

[31] During cross-examination DW2 maintained his evidence as stated in examination in-chief. He also further stated that the plaintiff was never asked to stop work during month of December to February 1997. DW2 also agreed to the suggestion that no evaluation was undertaken by Hijjas Kasturi as at 15 October 1998. He also testified that he was not aware whether ASM replied to the request by Takenaka Corporation for the pro rate basis.

Findings of The Court

First Issue

[32] Whether there was a legally valid and binding contract created by the letter of intent dated 1 October 1996 issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff.

[33] It is not disputed that the defendant had by a letter of intent dated 1 October 1996 which was addressed to the plaintiff requested the plaintiff to start preliminary and pre-contract works in respect of the execution and completion of the project. This direction by the defendant to the plaintiff to start preliminary works was set out with other terms in para. 3 of the letter of intent which provided for:

(a) the type of work to be carried out there under by the plaintiff for the defendant;

(b) duration of the contract; and

(c) the term of payment to the plaintiff for the preliminary and pre-contract works completed up to the expiry date of the said letter of intent.

[34] On perusal of the letter the court found that the language used to describe the contractual obligations in the letter of intent clearly shows that there was intention to create a legally binding and enforceable contract and therefore, the acceptance communicated by the plaintiff to the defendant resulted into the contract being concluded. It is not disputed that upon receipt of the letter of intent, the plaintiff had immediately set out to perform its obligations by commencing preliminary works.

[35] It is the terms of the letter of intent that in the event no award of contract in respect of the project is made, the plaintiff shall be reimbursed for the works carried out during the two months period provided that the works performed shall be evaluated by Hijjas Kasturi Associates and that the payment endorsed by Hijjas Kasturi shall not exceed RM800,000.

[36] The evidence shows as of today, no payment has been received for the two months preliminary works carried out from 1 October 1996 to 1 December 1996. Therefore the plaintiff is entitled to claim payment from the defendant for the works performed.

[37] It is to be noted that the contract provided that payment for the preliminary works can only be approved if the evaluation of works done was made by Hijjas Kasturi. Nevertheless, no such evaluation was made. If we were to look into the matter carefully, the plaintiff had tried to procure this evaluation report from Hijjas Kasturi, but Hijjas Kasturi did not evaluate the works done because the defendant did not pay its fees. When the plaintiff proposed for its own appointed architect firm to do the evaluation works, the defendant refuted the idea (unlike Hijjas Kasturi which made no objection whatsoever) resulting the evaluation to be aborted.

[38] In the case of *Croudace v. London Borough of Lambeth* [1986] 33 BLR 20 the architect under the contract had retired and no other person was appointed to take his place, the court held that the employer's acts and omissions including but not limited to its failure to appoint a successor architect, amounted to a failure to take such steps as were necessary to enable the contractor's claim for loss and expenses be ascertained and these had amounted to a breach of contract.

[39] Therefore since it is the defendant who failed to do all the things necessary to procure the architect's certificate, the defendant has committed a breach to the contract ie, the letter of intent. The defendant had also failed to give any evidence to dispute the actual sum incurred in the preliminary works during trial and thus is deemed to be admitted. Therefore it is my considered view that there was a legally valid and binding contract created by the letter of intent dated 1 October 1996

issued by the defendant to the plaintiff in respect of the works carried out by the plaintiff and the defendant had breached its obligation under the first contract by failing to secure the certificate of evaluation from Hijjas Kasturi, the project architect.

Second Issue

[40] Whether there was a fresh second contract which came into force on 1 December 1996 between the plaintiff and the defendant by way of their conduct.

[41] The second contract ie, the extension letter of intent came into force on 1 December 1996 upon expiry of the first letter of intent. The evidence of both plaintiff's and defendant's witnesses shows that the plaintiff continued carrying out the preliminary works and the defendant in turn had not disapproved the plaintiff's act or conduct. Thus I am of the view that the conduct of both parties show that the parties had intended to have a subsequent contract in respect of the extension of the first letter of intent. The defendant had also not in any manner objected to the plaintiff's condition that the works performed during the second contract be assessed on a pro rate basis.

[42] The extension letter of intent which was dated and came into force in 1 December 1996 was received by the plaintiff only on 3 February 1997. This clearly shows that the letter was backdated contrary to what was testified by DW2. Evidence shows that in between 1 December 1996 and 3 February 1997 the plaintiff had agreed to continue in good faith with the preliminary works because it believed that the defendant would reimburse it for the value of the works performed during the validity period of the second contract.

[43] Had the defendant made known to the plaintiff that reimbursement would be limited to RM800,000 at the time before the second contract came into force, the plaintiff would have discontinued the preliminary works. Thus, the defendant is *estopped* from denying the existence of the second contract. It can then be concluded that there indeed was a fresh second contract which came into force on 1 December 1996 between the plaintiff and the defendant by way of their conduct.

Third Issue

[44] Whether the defendant's liability, if any, is only limited to RM800,000.

[45] The plaintiff's work under the second contract should be reimbursed on the basis of *quantum meruit*. In the book *Keating on Building Contracts*, 5th edn by Anthony May at p. 78 *quantum meruit* is explained as "The expression *quantum meruit* means 'the amount he deserves' or 'what the job is worth' and in most instances denotes a claim for a reasonable sum. A claim on a *quantum meruit* basis cannot arise if there is an existing contract between the parties to pay an agreed sum. But there maybe a *quantum meruit* claim where there is:

1. an express agreement to pay a reasonable sum;

2. no price fixed. If the contractor does work under a contract expressed or implied and no price is fixed by the contract, he is entitled to be paid a reasonable sum for his labor and the materials supplied ..."

[46] In this case since the second contract had arisen from the conduct of both parties, and no remuneration for works done by the plaintiff was fixed, the plaintiff is entitled to be paid a reasonable sum on a pro rate basis to which the defendant never raised any objection in their letter dated 29 January 1997.

[47] I am also of the view that since the clause to limit the reimbursement sum only came to be known by the plaintiff after the plaintiff had commenced preliminary works for the second stage of the contract, there was no consensus as to this term. Therefore it was non-existent and no such clause regarding the remuneration for works carried out exists and thus a claim on *quantum meruit* would be the proper remedy.

[48] In the circumstances it can be concluded that the defendant's liability is not only limited to RM800,000 but should be based on *quantum meruit*.

Conclusion

[49] Upon considering the evidence of the witnesses, facts and circumstances of the case and the learned counsels' submissions, the court is of the opinion that the plaintiff has proven its case.

[50] Therefore the plaintiff's claim is allowed for the sum of RM2,800,000 being RM800,000 under the first contract and the sum of RM2,000,000 based on pro rate basis of RM400,000 per month for five months from 1 December 1996 to 1 May 1997 with interest and costs.